(1)

Supreme Court, U.S.
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No. 04-876 OCT 27 2004

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In The

Supreme Court of the United States

DR. CRAIG G. PROHAZKA,

Petitioner,

v.

THE CLEVELAND CLINIC FOUNDATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To Ohio's Tenth District Court of Appeals.

PETITION FOR A WRIT OF CERTIORARI

Dr. Craig G. Prohazka, pro se
3401 Forest Grove Court
Durham, NC 27703
919 596 4219

QUESTIONS PRESENTED

Whether the due process clause of the Fourteenth Amendment to the Constitution of the United States requires state courts to ensure that discovery is a two-way street.

Upon an appeal reviewing a state court's handling of discovery, whether the due process clause of the Fourteenth Amendment allows a state appellate court to require an appellant to establish that he was prejudiced by lack of discovery.

PARTIES TO THE PROCEEDING

The court whose judgment is to be reviewed is Ohio's Tenth District Court of Appeals. The defendant-appellees of that proceeding are the respondents in this Court, namely the Cleveland Clinic Foundation, Jacob Palomaki, Pamela Jelly-Boyers, Kathy Shy, Seth Kantor, Brian Bowyer, James Hoekstra, Thomas Mauger, Roy St. John, and Mary McIlroy. The title of the case in the lower courts was "Prohazka v. Ohio State University Board of Trustees, et. al." The title in this Court differs because the Ohio State University Board of Trustees is no longer a party. The petitioner in this Court is the plaintiff-appellant in the lower courts and is Dr. Craig G. Prohazka.

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays for a writ of certiorari to review the judgment of Ohio's Tenth District Court of Appeals in this case.

OPINIONS BELOW

The decision of Ohio's Tenth District Court of Appeals to which this petition is directed is WebCite No. 2004-Ohio-1601. It is available online at http://www.sconet.state.oh.us/rod/newpdf/10/2004/2004-ohio-1601.pdf. It is reprinted in Petitioner's Appendix (Pet. App.) at 2-15.

JURISDICTION

The decision of Ohio's Tenth District Court of Appeals was entered on March 30, 2004. The petitioner timely appealed that decision to the Supreme Court of Ohio, which declined jurisdiction in the ruling of August 4, 2004 set forth in Pet. App. at 1.

The petitioner claims abridgments of his right to due process under the Fourteenth Amendment to the Constitution of the United States. Hence, this Court has jurisdiction to review the judgment of Ohio's Tenth District Court of Appeals of Ohio under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The due process clause of the Fourteenth Amendment to the Constitution of the United States is included in the last sentence of Section 1 of that

amendment. That section reads in its entirety:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Case History

The petitioner is Dr. Craig G. Prohazka. He bears the title of Dr. because he earned a PhD in the field of electrical and computer engineering in 1981. He was a student at The Ohio State University College of Medicine from August 1992 to June 14, 1995. The petitioner applied to and was accepted into a cooperative program offered by Ohio State University College of Medicine and the Cleveland Clinic Foundation, whereby the petitioner was to complete the third year (August 1994 to June 1995) clinical rotations at the Cleveland Clinic. The petitioner experienced certain difficulties during his medical education, including some negative evaluations during two clinical rotations. The Ohio State University College of Medicine notified the petitioner that he had to do three things to continue his medical education: repeat the third year, submit to "all recommendations and interventions suggested by" a psychiatrist for an indefinite period of time, and undertake a 3 month unaccredited course of study with

with a "mentor/tutor". The petitioner refused the psychiatric requirement and was dismissed. The complaint alleges breach of contract, arbitrary and capricious grading, 42 U.S.C. § 1983 violations, libel, interference with contract, and others, all based upon events of the petitioner's medical education.

In a decision of April 24, 2003, the trial court granted the respondents' motion for summary judgment, thereby dismissing the entire case. The petitioner appealed that decision to Ohio's Tenth District Court of Appeals, which affirmed on March 30, 2004. The petitioner then appealed to the Supreme Court of Ohio, which declined jurisdiction on August 4, 2004.

Over the years, the petitioner seven times served written discovery requests including interrogatories, requests for production, and requests for admission upon the respondents. On December 12, 1997, the respondents did respond to the first set of discovery requests. But the responses to almost all the discovery requests were objections. No information was included. The other written discovery requests were each met with a motion for protective order. Only one such motion was ruled upon before the discovery cut-off date in force at the time. That motion was granted. The petitioner filed 3 motions to compel discovery. None was ruled upon before the discovery cut-off date in force at the time. The petitioner filed at least 20 subpoenas to deposition. No potential deponent ever appeared in response to the petitioner's subpoenas in spite of two trips from his home in Durham, North Carolina, to Columbus, Ohio, to take the depositions. Each subpoena was met with a motion to quash, some timely and some not. No motion to quash was ruled upon before the discovery cut-off date in force at the time.

The respondents voluntarily deposed some witnesses in privity with them. Almost all potential witnesses in this case were employed by the Cleveland Clinic or by Ohio State University College of Medicine. Therefore they were in privity with the respondents and earlier defendants in this case. If some potential witnesses in privity with the respondents had information that would be useful to the petitioner, counsel for the respondents could ask them to refrain from cooperating with the petitioner's attempts to depose them. If other such witnesses had no information that would be useful to the petitioner, counsel for the respondents could allow them to cooperate. The petitioner could not force depositions of witnesses he wanted. So, voluntary depositions were no adequate substitute for depositions conducted under force of subpoena. Yet the petitioner was denied the power of subpoena by the regular failure of the trial court to rule on motions to quash until after the expiry of the discovery cut-off deadline.

II. Ohio Courts Have Considered the Two Federal Questions Presented For Review Here

Ohio courts have considered the two federal questions presented in this petition. Specifically, the petitioner obtained from Ohio's Tenth District Court of Appeals review of the one-sided discovery permitted by the trial court. The second issue presented for review in Appellate Brief for Plaintiff-Appellant filed July 24, 2003 was:

> "Is it an abuse of a trial Court's discretion to refrain from ruling on many discovery-related motions until the discovery cut-off date has passed or to refrain from ruling on them at all and then to grant a motion for

summary judgment after little discovery has occurred?" (page 3 of Appellate Brief)

The fourth issue presented for review was:

> "Is it an abuse of a trial Court's discretion to grant Defendant-Appellees leave to conduct depositions after discovery cut-off without agreement by Plaintiff-Appellant, where almost all potential witnesses are in privity with Defendant-Appellees?" (page 3 of Appellate Brief)

The sixth issue presented for review was:

> "Is it an abuse of a trial Court's discretion to avoid participation in a case before it by failing to rule on many discovery-related motions before it and by ruling on other discovery-related motions only after the discovery cut-off has passed?" (page 4 of Appellate Brief)

The ruling of the court of appeals in response to the Brief quoted above is included as Pet. App. at 2-15. The grant of summary judgment was affirmed.

Petitioner raised the second federal question in his appeal to the Supreme Court of Ohio. As stated above, that question was the following: upon an appeal reviewing a state court's handling of discovery, does the due process clause of the Fourteenth Amendment allow a state appellate court to require an appellant to establish that he was prejudiced by lack of discovery.

The court of appeals stated this requirement in its opinion of March 30, 2004 (Pet. App. bottom of 11). Therefore, the petitioner could not have raised this issue earlier in the case than upon appeal to the Supreme Court of Ohio. The petitioner sought discretionary review by that court in the Memorandum in Support of Jurisdiction of Appellant Dr. Craig G. Prohazka. On page 10 of that memorandum, the petitioner listed the following proposition of law as one of four justifying review by that court.

> **'Proposition of Law No. IV: It is a denial of due process to require a party to prove that he was prejudiced by lack of sufficient discovery.**
>
> The decision of the court of appeals states at the end of page 15 [Pet. App. bottom of 11] "[a]ssuming, arguendo, that the trial court failed to comply with Loc.R. 39.04 and/or failed to journalize the actions taken at the status conference after the April 1, 2002 deadline for filing a memorandum contra, plaintiff has failed to establish that he was prejudiced by the trial court's actions." As indicated above, the gravamen of the appellant's appeal to the court of appeals was the granting of the motion for summary judgment after insufficient discovery. How can an appellant establish that he has been prejudiced by lack of discovery? How can he prove facts which have not been disclosed to him? Such a requirement is unreasonable. Yet the court of appeals required this.'

REASONS FOR GRANTING THE PETITION

This case presents two fundamental constitutional questions of great importance to much civil litigation in state courts of the United States. As listed above, the first issue is whether the due process clause of the Fourteenth Amendment to the Constitution of the United States requires state courts to ensure that discovery is a two-way street.

I. Due Process Requires That Discovery Be a Two-Way Street

'Due process requires that discovery "be a two-way street."' *Weatherford v. Bursey*, 429 U.S. 545, 562 (1977). Yet, in the Statement of the Case above, the petitioner explained that the trial court by its inaction prevented discovery by the petitioner when the respondents were in a position not to need formal discovery. That is, because almost all potential witnesses were in privity with the respondents, the petitioner needed formal discovery while the respondents did not. Yet, the trial court ruled on none of the petitioner's discovery motions until after the expiry of the discovery deadlines. The inaction of the trial court ensured that discovery was not a two-way street.

In the context of a statutory requirement that a criminal defendant disclose to the state information concerning a claimed alibi, this Court held "[w]e hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless *reciprocal* discovery -rights are given to criminal defendants." *Wardius v. Oregon*, 412 U.S. 470, 472 (1973), emphasis added. So, on another occasion, this Court opined that discovery is to be a two-way street.

Yet, Ohio's court of appeals did not reverse the grant of summary judgment and the Supreme Court of Ohio declined jurisdiction. In short, a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

II. It Is a Denial Of Due Process To Require a Party To Prove That He Was Prejudiced by Insufficient Discovery

As stated above, the second issue is the following. Upon an appeal reviewing a state court's handling of discovery, does the due process clause of the Fourteenth Amendment allows a state appellate court to require an appellant to establish that he was prejudiced by lack of discovery.

As quoted above, the opinion of the Ohio court of appeals states in paragraph 28 (Pet. App. bottom of 11, or equivalently in the middle of page 11 of the online version of the opinion) "... plaintiff has failed to establish that he was prejudiced by the trial court's actions." The gravamen of the petitioner's appeal to the court of appeals was the granting of the motion for summary judgment after insufficient discovery. How can a party establish that he has been prejudiced by insufficient discovery? The insufficient discovery itself ensures that the undiscovered facts remain unknown to the party. Such a requirement is plainly unreasonable. It is a denial of due process by a state court. It does not comport with the Fourteenth Amendment.

CONCLUSION

This case presents in clear fashion the issue of whether the due process clause of the Fourteenth

Amendment to the Constitution of the United States requires state courts to ensure that discovery is a two-way street. A state court has decided this important question of federal law in a way that conflicts with relevant decisions of this Court.

This case also presents in clear fashion the issue of whether the due process clause of the Fourteenth Amendment allows a state appellate court to require an appellant to establish that he was prejudiced by lack of discovery upon an appeal reviewing a lower state court's handling of discovery. Such a requirement is plainly unreasonable.

The granting of this petition would allow this Court the opportunity to address two discovery-related constitutional questions of importance to much civil litigation in the state courts of the United States.

The denial of this petition would allow state courts to continue to determine the outcome of civil litigation by one-sided handling of discovery.

To promote and preserve the right to due process in the courts of the states, this Court should grant jurisdiction to hear this case and review the erroneous and unreasonable decision of Ohio's Tenth District Court of Appeals.

Respectfully submitted,

Dr. Craig G. Prohazka
Petitioner pro se

The Supreme Court of Ohio

FILED
AUG 04 2004
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SUPREME COURT OF OHIO

Craig G. Prohazka,
Appellant,

v.

Ohio State University Board of Trustees et al.,
Appellees.

Case No. 04-761

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee: $40.00, paid by Craig G. Prohazka.

(Franklin County Court of Appeals; No. 03AP616)

s/Thomas J. Moyer
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
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FRANKLIN CO. OHIO
04 MAR 30 PM 2:25
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Craig G. Prohazka, :

Plaintiff-Appellant, :

v. : No. 03AP-616
(C.P.C. No. 97CVH-06-6082)

Ohio State University Board of Trustees, et al., : (REGULAR CALENDAR)

Defendants-Appellees. :

OPINION

Rendered on March 30, 2004

Craig G. Prohazka, pro se.

Chester, Willcox & Saxbe, LLP, Charles R. Saxbe and Elizabeth J. Watters, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

LAZARUS, P.J.

{¶1} Plaintiff-appellant, Craig G. Prohazka, appearing pro se, appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendants-appellees, the Cleveland Clinic Foundation ("Cleveland Clinic"), Dr. Jacob Palomaki, Dr. Pamela Jelly-Bowers, Dr. Kathy Shy, Dr. Seth Kantor, Dr. Brian Bowyer, Dr. James Hoekstra, Dr. Thomas Mauger, Dr. Roy St. John, and Dr. Mary McIlroy. For the reasons that follow, we affirm the trial court's judgment. ***2**

{¶2} The instant appeal arises from plaintiff's dismissal from The Ohio State University College of Medicine ("OSU"). The facts underlying plaintiff's dismissal are set forth in a previous opinion of this court rendered in Prohazka v. Ohio State Univ. Bd. Of Trustees (Dec. 16, 1999), Franklin App. No. 99AP-2:

> [P]laintiff was a medical student at OSU from August 20,1992, until June 14, 1995. For his third year of medical school, plaintiff chose a program OSU offered in cooperation with the Cleveland Clinic. The program allowed plaintiff to complete his clinical rotations, the bulk of a third-year medical student's work, at the Cleveland Clinic and Fairview Hospital in Cleveland.
>
> On December 12, 1994, OSU informed plaintiff he received a grade of unsatisfactory for the obstetrics/gynecology rotation he had just completed. Plaintiff unsuccessfully appealed the grade to the grading committee on January 23, 1995. On December 12, 1995, a hearing was held before the Student Review Subcommittee. Following the hearing, the members of the

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> Student Review Subcommittee *unanimously* voted to dismiss plaintiff from medical school. Plaintiff was informed of the decision in a January 22, 1995 letter from the Student Review Subcommittee chairperson, Dr. Kathy Shy.
>
> On February 9, 1995, the Clinical Academic Standing Committee met to hear plaintiff's appeal from the decision of [the] Student Review Subcommittee. On February 13, 1995, the Clinical Academic Standing Committee notified plaintiff that all of his third year credit was being revoked, that he was being suspended from further participation in the normal course of study, and that he would be dismissed from OSU unless he agreed to (1) embark on a three-month unaccredited course of education with a mentor/tutor, (2) repeat the entire third year of medical school, and (3) submit to all recommendations and interventions suggested by a psychiatrist for an indefinite period of time. Plaintiff refused to accede to those conditions, and on June 14, 1995, the Academic Review Board dismissed plaintiff from OSU. ***3**

{¶3} In June 1997, plaintiff filed a 95 paragraph complaint in the Franklin County Court of Common Pleas against defendants, the OSU Board of Trustees, Fairview Hospital and several additional physicians. Plaintiff's complaint contains claims of constitutional and state law violations arising out of his dismissal from medical school.[1] Following a motion for summary judgment by Fairview Hospital and motions to dismiss by the other named defendants, the trial court dismissed all of plaintiff's claims.

{¶4} Plaintiff appealed the dismissals to this court. In two separate opinions, this court affirmed the dismissal of all of the claims against the OSU Board of Trustees, Fairview Hospital and nine other physicians. See Prohazka, supra, and Prohazka v. Ohio State Univ. Bd. of Trustees (June 7, 2001), Franklin App. No. 01AP-100 (Memorandum Decision).

{¶5} Plaintiff's claims which remain at issue are (1) constitutional claims under Section 1983, Title 42, U.S. Code alleging violations of plaintiff's right to privacy by Dr. Jelly-Bowers, violations of plaintiff's right to due process of law by Drs. Palomaki, Kantor, and McIlroy, and violations of plaintiff's right to freedom of speech by Drs. Shy, Bowyer, Hoekstra, Mauger, and St. John; and (2) state law claims against the Cleveland Clinic for tortious interference with a contract, conspiracy to tortiously interfere with a contract, arbitrary and capricious grading, conspiracy to grade arbitrarily and capriciously, fraud,1 For a detailed recitation of all of the defendants named and the causes of action asserted in the complaint, see Prohazka, supra. No. 03AP-616 4and breach of doctor-patient confidentiality, all premised on the theory that the Cleveland Clinic ***4** is vicariously liable for the conduct of the doctors on its staff who evaluated and graded plaintiff's performance as a medical student.

{¶6} After the case was remanded to the trial court, the case schedule was modified by agreed order filed May 4, 2000. A previously ordered stay of discovery was lifted, with formal discovery to commence on September 18, 2000 and continue until July 13, 2001. The order set the dispositive motion cut-off date as September 28, 2001and the trial date as March 4, 2002.

{¶7} On September 8, 2000, plaintiff served on all defendants several discovery requests, including a request for 413 admissions to the Cleveland Clinic and numerous requests for admission to the other defendants. Defendants filed a motion for a protective order, seeking to relieve

them of responsibility for responding to any of plaintiff's requests for discovery on the ground that the requests were filed in violation of the stay of discovery. Defendants also sought to continue the stay of discovery in the case until October 31, 2000. The trial court granted defendants' motion for protective order and stayed discovery until October 31, 2000.

{¶8} In December 2000, plaintiff served on all defendants another set of discovery requests, including interrogatories, requests for production of documents, and requests for admission. On January 26, 2001, defendants filed a motion to stay all proceedings and discovery pending the resolution of plaintiff's second appeal to this court. On January 29, 2001, plaintiff filed a motion to compel responses to his discovery requests. ***5**

{¶9} On May 24, 2001 and June 18, 2001, defendants filed motions to quash subpoenas served by plaintiff and for protective orders prohibiting plaintiff from seeking discovery of several non-party witnesses.

{¶10} Plaintiff, on September 4, 2001, filed a motion to extend discovery past the July 13, 2001 deadline on the grounds that the trial court had yet to rule on several outstanding motions and that counsel for defendants had failed to cooperate with plaintiff's discovery attempts.

{¶11} By decision and judgment entry filed October 2, 2001, the trial court denied as moot defendants' January 26, 2001 motion to stay proceedings, denied plaintiff's January 29, 2001 motion to compel, and granted defendants' May 24, 2001 motion to quash and request for protective order. In denying plaintiff's motion to compel, the court determined that plaintiff's discovery requests did not appear to be reasonably calculated to lead to the discovery of admissible evidence as provided in Civ.R. 26(B)(1) and were unduly burdensome and oppressive.

{¶12} On November 14, 2001, the trial court filed a decision and entry which, inter alia, granted defendants' June 18, 2001 motion to quash and request for protective

order and granted plaintiff's September 4, 2001 motion to extend discovery. The court extended discovery to January 31, 2002.

{¶13} In December 2001, plaintiff served on all defendants several discovery requests, including interrogatories, requests for admission, and requests for production of documents. On January 11 and 14, 2002, defendants filed motions for protective orders, ***6** seeking to relieve them of responsibility for responding to plaintiff's discovery requests on the ground that the current requests were substantially similar to the preceding requests, which the court had already found were not reasonably calculated to lead to the discovery of admissible evidence and were unduly burdensome and oppressive.

{¶14} On January 15, 2002, several non-party witnesses filed a motion to quash the subpoenas duces tecum of plaintiff and for a protective order prohibiting plaintiff from taking their deposition testimony.

{¶15} On February 15 and 19, 2002, defendants filed several notices documenting defendants' intent to take videotape depositions of two of the defendant physicians and several of the physicians who were previously dismissed from the case. Plaintiff responded with a motion for a protective order, seeking to prohibit defendants from conducting the depositions on the ground they were scheduled after the discovery cut-off date of January 31, 2002.

{¶16} Pursuant to a motion filed by plaintiff on February 19, 2002, the trial court held a status conference on February 25, 2002. Shortly thereafter, on March 4, 2002,defendants filed a motion for summary judgment on all of plaintiff's claims against them.

{¶17} On March 19, 2002, plaintiff filed a motion requesting a written order reciting the action taken at the February 25, 2002 status conference. By separate motion filed the same day, plaintiff requested another status conference so that the court could address defendants'

alleged failure to cooperate with plaintiff's deposition requests. In his memorandum in support of that motion, plaintiff acknowledged that the court stated at the *7 February 25, 2002 status conference that it would allow defendants to file a motion for summary judgment on March 4, 2002 and would allow plaintiff 28 days, or until April 1,2002, to conduct additional discovery and respond to defendants' motion.

{¶18} One week later, on March 26, 2002, plaintiff filed a motion to strike defendants' motion for summary judgment. Plaintiff argued that defendants' motion was untimely, as it was filed after the dispositive motion cut-off date and, despite the court's oral statement at the February 25, 2002 status conference that defendants could file a motion for summary judgment on March 4, 2002, the dispositive motion cut-off date had not been extended by either a journal entry from the trial court or by mutual agreement of the parties. Plaintiff further argued that he was unable to adequately respond to defendants' summary judgment motion because, despite the trial court's oral statement at the February 25, 2002 status conference that plaintiff would be allowed 28 days, or until April 1, 2002, to respond to defendants' motion and would order discovery to begin and continue through the 28-day response period, no journal entry recommencing discovery had been filed. Plaintiff further argued that counsel for defendants had not cooperated with plaintiff's attempts to depose several witnesses.

{¶19} Citing Civ.R. 56(F), plaintiff, on April 5, 2002, moved for a continuance of the deadline for filing his memorandum contra and sought a new discovery cut-off date of May 15, 2002. In support of his motion, plaintiff contended: (1) he had not had enough time to participate in the depositions taken to date and to compose a memorandum contra; (2) he needed to take additional depositions and defendants had not cooperated *8 in scheduling those depositions; and (3) the trial court had not,

by journal entry, specified that discovery had been recommenced after it ended on January 31, 2002.

{¶20} In response to plaintiff's March 19, 2002 motion, the trial court, on April 8,2002, filed an entry journalizing the rulings issued at the February 25, 2002 status conference. In pertinent part, the court noted that trial had been rescheduled for July 23,2002. The court further noted that it had been explained to plaintiff that the parties were permitted to conduct trial depositions at any time for parties or witnesses who were unavailable for trial and that the trial depositions noticed by defendant would go forward regardless of plaintiff's participation therein. In addition, the trial court noted that it had granted leave to plaintiff and defendants to file motions for summary judgment on or before March 4, 2002, with responses due 28 days thereafter. The court also noted that plaintiff had represented that he did not need additional discovery or depositions to respond to a motion for summary judgment filed by defendants.

{¶21} In late April 2002, plaintiff subpoenaed several non-party witnesses for deposition. Defendants filed motions to quash and requests for protective orders.

{¶22} On May 24, 2002, plaintiff filed a memorandum contra defendants' motion for summary judgment.

{¶23} On June 7, 2002, the trial court filed a decision and entry denying plaintiff's March 26, 2002 motion to strike defendants' motion for summary judgment and denying plaintiff's April 5, 2002 motion for continuance of the deadlines for discovery and for filing his memorandum contra. The trial court found that despite the fact that at the time ***9** plaintiff filed his March 26, 2002 motion the court had not yet journalized the actions taken at the status conference, plaintiff was well aware of the deadline for filing summary judgment motions and responses thereto. The court also noted that plaintiff represented to the court at the February 25, 2002 status

conference that he would not require further discovery in preparation of his memorandum contra and that defendants had voluntarily responded to plaintiff's discovery since the date of the status conference.

{¶24} On April 24, 2003, the trial court filed a decision and entry granting defendants' motion for summary judgment and denying as moot all pending motions. In its decision, the trial court noted that it did not consider plaintiff's memorandum contra, as it had been filed 49 days after the deadline set by the court at the February 25, 2002status conference and plaintiff had not requested leave to file after the deadline. The trial court filed a judgment entry journalizing its decision on May 22, 2003. Plaintiff timely appeals, assigning the following error:

> The trial court erred in its April 24, 2003 granting of Motion for Summary Judgment of Defendants The Cleveland Clinic Foundation, Jacob Palomaki, Pamela Jelly-Bowers [sic],Kathy Shy, Seth Kantor, Brian Bowyer, James Hoekstra, Thomas Mauger, Roy St. John, and Mary McIlroy filed March 4, 2002.

{¶25} Plaintiff's assignment of error challenges the trial court's granting of summary judgment to defendants on all of plaintiff's claims against them.

{¶26} Ordinarily, our review of a trial court's grant of summary judgment requires us to determine independently whether, viewing the evidence most strongly in favor of then on-moving party, no genuine issues of material fact exist, the moving party is entitled ***10** to judgment as a matter of law, and reasonable minds could only reach a conclusion which is adverse to the non-moving party. Harless v. Willis Day Warehousing Co.

{¶27} In the instant case, however, plaintiff does not contend that genuine issues of material fact exist or that defendants were not entitled to judgment as a matter of law. Instead, plaintiff maintains that summary judgment was inappropriate because the trial court prevented him from presenting evidence which would have created genuine issues of material fact. Specifically, plaintiff contends that the trial court: (1) erred as a matter of law in failing to consider his memorandum contra; (2) abused its discretion in the management of discovery; and (3) abused its discretion in granting defendants leave to file a motion for summary judgment after the dispositive motion deadline had passed.

{¶28} Plaintiff first contends that the trial court erred in failing to consider his memorandum contra. It is clear that the trial court did not consider plaintiff's response to defendants' motion for summary judgment. The trial court's reason for not doing so, stated in its April 24, 2003 decision and entry, was that plaintiff's response was untimely, as it was filed past the April 1, 2002 deadline for filing a response to defendants' motion for summary judgment imposed at the February 25, 2002 status conference. Plaintiff contends that he was not obligated by the April 1, 2002 deadline for two reasons: (1) the trial court failed to prepare, file and promptly serve an amended case schedule including the deadline for filing a memorandum contra as required by Loc.R. 39.04(A) of the Franklin County Court of Common Pleas; and (2) the trial court did not journalize the ***11** actions taken at the February 25, 2002 status conference, including setting the April 1,2002 deadline for filing a memorandum contra, until April 8, 2002, which was after the deadline had already passed. Assuming, arguendo, that the trial court failed to comply with Loc.R. 39.04 and/or failed to journalize the actions taken at the status conference after the April 1, 2002 deadline for filing a memorandum contra, plaintiff has failed to establish that he was prejudiced by the

the April 1, 2002 deadline for filing a memorandum contra, plaintiff has failed to establish that he was prejudiced by the trial court's actions. In his March 19, 2002 motion requesting a status conference, his March 26, 2002 motion to strike defendants' motion for summary judgment and in his brief before this court, plaintiff acknowledges that at the February 25, 2002 status conference, the trial court set April 1, 2002 as the deadline for filing a memorandum contra. Further, in its April 8, 2002 entry journalizing the actions taken at the February 25, 2002 status conference, the trial court stated that it informed the parties at the status conference of the deadlines for filing motions for summary judgment and responses thereto. Plaintiff was thus well aware of the deadline for filing his memorandum contra. This court has previously held that "it is not error to rule on a summary judgment motion without considering memoranda and affidavits filed out-of rule." Ayers v. Demas (Mar. 28, 1996), Franklin App. No. 95APE10-1296. Based upon the procedural history of this case, we cannot find that the trial court erred in failing to consider plaintiff's memorandum contra.

{¶29} Plaintiff next contends that the trial court's mismanagement of the discovery process so prejudiced his ability to oppose defendants' motion for summary judgment that the trial court decision to grant summary judgment should be reversed. In particular, plaintiff contends that he was unfairly prevented from successfully opposing the summary judgment motion by (1) the trial court's failure to recommence discovery after the February 25, 2002 status conference, thereby preventing him from subpoenaing witnesses for deposition, (2) the trial court's failure to order defendants to respond to his requests for responses to interrogatories, request for production of documents and requests for admissions, (3) the trial court's granting of leave for defendants to conduct depositions after the discovery cut-off date without the agreement and/or

participation of plaintiff, and (4) the trial court's failure to timely rule on discovery-related motions.

{¶30} Plaintiff presented similar arguments in his first appeal to this court. In addressing those arguments, we stated:

> Civ.R. 56(F) addresses the situation in which plaintiff claims to have found himself in opposing the Fairview Hospital defendants' motion for summary judgment, and it states: Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just. Pursuant to Civ.R. 56(F), a party who believes that it is unable to adequately oppose a motion for summary judgment by affidavit must submit an affidavit to the court stating the reasons why it is unable to present facts necessary to oppose the motion for summary judgment by affidavit. If the trial court finds that the affidavit sets forth sufficient reasons for the party's inability to oppose the motion for summary judgment by affidavit, the trial court may refuse to grant summary judgment, or order a continuance to permit the party to obtain affidavits or to conduct discovery. Stewart v. Seedorff (May 27, 1999), Franklin App. No. 98AP-1049, unreported(1999 Opinions 1398). Here, plaintiff never submitted an affidavit to the trial court pursuant to Civ.R. 56(F). The trial

> court was without authority to provide plaintiff with relief under Civ.R. 56(F). State v. Coulverson v. Ohio Adult Parole Auth.(1991), 62 Ohio St.3d 12, 14, 577 N.E.2d 352.

{¶31} In the instant case, plaintiff filed a motion to continue the deadline for filing his memorandum contra pursuant to Civ.R. 56(F), claiming that he had not had enough time to participate in the depositions that had already been taken and/or to compose a memorandum contra. He also claimed that further discovery was needed without indicating what he expected the discovery to reveal. None of plaintiff's claims were supported by affidavits. Having failed to present these facts by affidavit, plaintiff's motion did not comply with the requirements of Civ.R. 56(F), and the trial court was without authority to provide plaintiff with relief under Civ.R. 56(F). Liguzinski v. Olsieski (June 26,1986), Cuyahoga App. No. 50770; Prohazka, supra.

{¶32} Finally, plaintiff contends that the trial court abused its discretion in permitting defendants to file a motion for summary judgment after the dispositive motion cut-off date of September 28, 2001. The September 28, 2001 cut-off date was set by agreed order of the parties on May 4, 2000. On plaintiff's own motion, the court extended No. 03AP-616 14discovery to January 31, 2002, making it impossible for the dispositive motion cut-off date of September 28, 2001 to remain effective. Further, plaintiff has failed to establish that he was prejudiced by the trial court's action. As previously noted, plaintiff acknowledges in his March 26, 2002 motion to strike defendants' motion for summary judgment and in his appellate brief that the trial court, at the February 25, 2002 status conference, extended the deadline for filing a motion for summary judgment to March 4, 2002.

{¶33} For the foregoing reasons, plaintiff's single assignment is overruled and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BOWMAN and WATSON, JJ., concur.

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[1] For a detailed recitation of all of the defendants named and the causes of action asserted in the complaint, see *Prohazka*, supra.

(2)

Supreme Court, U.S.
FILED

OCT 27 2004

OFFICE OF THE CLERK

No. 04-876

In The

Supreme Court of the United States

DR. CRAIG G. PROHAZKA,

Petitioner,

v.

THE CLEVELAND CLINIC FOUNDATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To Ohio's Tenth District Court of Appeals.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Dr. Craig G. Prohazka, pro se
3401 Forest Grove Court
Durham, NC 27703
919 596 4219

FINAL APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

TERMINATION NO. 18
BY ____

CRAIG PROHAZKA	:	
	:	
Plaintiff,	:	
	:	Case No. 97CVH-06-6082
vs.	:	
	:	Judge J. Brunner
OHIO STATE UNIVERSITY BOARD OF TRUSTEES, et. al.,	:	
	:	
Defendants.	:	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
03 MAY 22 AM 11:28
CLERK OF COURTS

JUDGMENT ENTRY
GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
FILED MARCH 4, 2002

This matter came before the Court on Defendants the Cleveland Clinic Foundation, Jacob Palomaki, M.D., Pamela Jelly-Bowers, Ph.D. Kathy Shy, M.D., Seth Kantor, M.D., Brian Bowyer, M.D., James Hoekstra, M.D., Thomas Mauger, M.D., Roy St. John, M.D. and Mary McIlroy,

M.D.'s Motion for Summary Judgment on all remaining counts in Plaintiffs' complaint, filed March 4, 2002.

WHEREUPON, the Court finds that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. It is, therefore, ORDERED that Defendants the Cleveland Clinic Foundation, Jacob Palomaki, M.D., Pamela Jelly-Bowers, Ph.D, Kathy Shy, M.D., Seth Kantor, M.D., Brian Bowyer, M.D., James Hoekstra, M.D., Thomas Mauger, M.D., Roy St. John, M.D. and Mary McIlroy, M.D.'s Motion for Summary Judgment, filed March 4, 2002, is GRANTED. Judgment is rendered in favor of Defendants the Cleveland Clinic Foundation, Jacob Palomaki, M.D., Pamela Jelly-Bowers, Ph.D, Kathy Shy, M.D., Seth Kantor, M.D., Brian Bowyer, M.D., James Hoekstra, M.D., Thomas Mauger, M.D., Roy St. John, M.D. and Mary McIlroy, M.D on all of Plaintiff's remaining claims and causes of action contained paragraphs 1, 7, 8, 10, 11, 14, 17, 19, 20, 24, 27, 29, 36, 39, 41, 46, 48, 51, 53, 55, 59, 63, 65, 67, 68, 70, 71, 76, 79, 81, 84, 88, and 93 of Plaintiff's Complaint. It is further

ORDERED that Defendants' motion for protective order, filed January 11, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion for a protective order, filed January 14, 2002 is DENIED as moot. It is further

ORDERED that Defendants' motion to quash, filed January 15, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion for an order prohibiting Plaintiff from testifying, filed January 31, 2002, is DENIED as moot. It is further

ORDERED that Plaintiff's motion for a protective order, filed February 1, 2002, is DENIED as moot. It is further

ORDERED that Plaintiff's motion for judicial notice, filed February 11, 2002 is DENIED as moot. It is further

ORDERED that Plaintiff's motion for a pretrial conference, filed February 19, 2002, is DENIED as moot. It is further

ORDERED that Plaintiff's motion for a protective order, filed February 19, 2002 is DENIED as moot. It is further

ORDERED that Plaintiff's motion to compel, filed April 12, 2002, is DENIED as moot. It is further

ORDERED that nonparty Jane Trask's motion to quash, filed April 23, 2002, is DENIED as moot. It is further

ORDERED that Plaintiff's motion for judicial notice, filed June 26, 2002, is DENIED as moot. It is further

ORDERED that Defendant's motion in limine, filed July 1, 2002, is DENIED as moot. It is further

ORDERED that Defendant's motion in limine, filed July 12, 2002, is DENIED as moot. It is further

ORDERED that Defendant's motion to quash, filed July 19, 2002, is DENIED as moot. It is further

ORDERED that Plaintiff's motion for written order regarding continuance of July 23, 2002 trial date and for new trial date, filed August 30, 2002 is DENIED as moot.

There is no just cause for delay in the entry of this order, and, therefore, this judgment is a final appealable order pursuant to Ohio Revised Code § 2505.02 and Civ. R. 54(B).

IT IS SO ORDERED.

Stamped/Jennifer L. Brunner
Judge Brunner

Copies to:

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Pro Se

Elizabeth Watters, Esq.
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Counsel for Remaining Defendants

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

CRAIG PROHAZKA:		
Plaintiff,	:	
	:	**CASE NO. 97 CVH 06 6082**
v.	:	
	:	**JUDGE JENNIFER L.**
	:	**BRUNNER**
OHIO STATE	:	
UNIVERSITY BOARD	:	
OF TRUSTEES, et. al.,	:	
	:	
Defendants.	:	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2003 APR 24 PM 4:51
CLERK OF COURTS

DECISION AND ENTRY

GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED MARCH 4, 2002
AND
DENYING AS MOOT DEFENDANTS' MOTION FOR PROTECTIVE ORDER FILED JANUARY 11, 2002
AND
DENYING AS MOOT DEFENDANTS' MOTION FOR A PROTECTIVE ORDER FILED JANUARY 14, 2002
AND
DENYING AS MOOT DEFENDANTS' MOTION TO QUASH FILED JANUARY 15, 2002
AND

DENYING AS MOOT DEFENDANTS' MOTION FOR AN ORDER PROHIBITING PLAINTIFF FROM TESTIFYING FILED JANUARY 31, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER FILED FEBRUARY 1, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION FOR JUDICIAL NOTICE FILED FEBRUARY 11, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION FOR A PRETRIAL CONFERENCE FILED FEBRUARY 19, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER FILED FEBRUARY 19, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION TO COMPEL FILED APRIL 12, 2002

AND

DENYING AS MOOT NONPARTY JANE TRASK'S MOTION TO QUASH FILED APRIL 23, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION FOR JUDICIAL NOTICE FILED JUNE 26, 2002

AND

DENYING AS MOOT DEFENDANTS' MOTION IN LIMINE FILED JULY 1, 2002

AND

DENYING AS MOOT DEFEDANTS' MOTION IN LIMINE FILED JULY 12, 2002

AND

DENYING AS MOOT DEFENDANTS' MOTION TO QUASH FILED JULY 19, 2002

AND

DENYING AS MOOT PLAINTIFF'S MOTION FOR WRITTEN ORDER

REGARDING CONTINUANCE OF JULY 23, 2002 TRIAL DATE AND FOR NEW TRIAL DATE FILED AUGUST 30, 2002

Rendered this 24th day of April, 2003.

This matter is before the Court on the motion of Defendants the Cleveland Clinic Foundation, Jacob Palomaki, M.D., Pamela Jelly-Boyers, Ph.D., Kathy Shy, M.D., Seth Kantor, M.D., Brian Bowyer, M.D., James Hoekstra, M.D., Thomas Mauger, M.D., Roy St. John, M.D. and Mary McIlroy, M.D. (hereinafter collectively, "the Defendants") for summary judgment filed March 4, 2002. Plaintiff, Craig Prohazka filed a memorandum contra on May 20, 2002, forty-nine days after the deadline set by the Court at the February 25, 2002 status conference. Plaintiff did not have leave of the Court to file after the deadline, therefore, the Court will not consider Plaintiff's memorandum contra. Defendants' motion is, therefore, submitted to the Court for decision pursuant to Loc. R. 21.01 and 57.01.

Procedural Considerations on Motion for Summary Judgment

Summary judgment is a procedural device designed to terminate litigation where a resolution of factual disputes is unnecessary. *Ferron v. Ray*, et al., 2000 Ohio App. LEXIS 6011 (December 21, 2000), Franklin App. No. 00AP-699, *unreported*.

Civ. R. 56 (C) provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A

> summary judgment shall not be rendered unless it appears from the evidence and stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made ...

The Ohio Supreme Court has succinctly summarized the requirements of Civ. R. 56 (C), as follows:

> ... (1) there is no genuine issue as to any material fact; (2) the movant is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made, the nonmovant being entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66. In reaching a conclusion on whether or not any genuine issues of fact do exist, the Court must exercise caution not only to resolve doubts, but also to construe the evidence before it, in a light most favorable to the non-moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317; *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356; *Norwest Bank Minnesota, N.A. v. Biscello*, 2000 Ohio App. LEXIS 5242 (November 14, 2000), *unreported*. The Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 340.

Facts of the Case

Plaintiff was a medical student at The Ohio State University College of Medicine ("OSU COM"). Plaintiff was provided a copy of the OSU COM Student Handbook, as were all students enrolled at OSU COM, which clearly delineated student review policies and procedures, as well

as the cognitive and non- cognitive requirements of all OSU COM students.

OSU COM has established a policy and procedure for the continual evaluation and review of students enrolled in the academic and clerkship programs at OSU COM. The review involves a four-level process. Each academic program of OSU COM has a Program Committee with a Student Review Subcommittee ("the Subcommittee") which is charged with the ongoing review of students in that Academic Program. A third- or fourth-year student is subject to review by the Subcommittee when he or she fails to meet a criterion, such as not performing satisfactorily in (and thereby failing) a clerkship or clinical rotation. The Clinical Academic Standing Committee reviews all recommendations by the Subcommittee to determine whether repetition of a significant portion of the curriculum, or dismissal is warranted. The Academic Review Board reviews recommendations of dismissal by the Clinical Academic Standing Committee to determine the extent of the information the Clinical Academic Standing Committee had available to it and to ensure that the OSU COM's policies and procedures were followed by the Subcommittee in making its review and recommendation. The Dean of the College then reviews and evaluates for approval recommendations forwarded by the Academic Review Board.

Students of OSU COM are expected to uphold the "highest degree of personal and professional integrity." (Handbook p. 10, Exh. A to Kantor Aff.). A requirement for graduation is "satisfactory completion of the medical curriculum" including "acquisition of knowledge, mastery of skills, and development of attitudes and behaviors necessary for the modern practice of medicine." (Id at 11). Medical students are therefore specifically evaluated on both cognitive and non-cognitive standards, including whether or not their behavior befits the profession. The

handbook details the "non-cognitive" standards required by OSU COM, which include the following:

- Medical students shall seek to assume personal responsibility for their medical education;
- Medical students shall seek appropriate consultation with faculty, staff and colleagues in their interactions with patients;
- Medical students shall demonstrate professional behavior expected of a physician;
- Medical students shall seek appropriate faculty supervision;
- Medical students shall show respect for their colleagues, faculty, staff and patients;
- Medical students shall establish rapport and deal honestly with patients, colleagues, faculty, staff and the patient's family; and
- Medical students shall treat with respect patients, their families, and their professional colleagues, including staff and other health care providers.

Id. at 10.

In 1993, during Plaintiff's first year of medical school, he received a low, but passing grade in anatomy. OSU COM Associate Dean for Medical Education and Student Affairs, Dr. Seth Kantor, met with Plaintiff concerning this grade and to see if Plaintiff needed assistance.

In 1994, during Plaintiff's second year of medical school, Andrew Jackson, Plaintiff's roommate at the time, contacted Assistant Dean of Student Affairs at OSU COM, Dr. Pamela Jelly-Boyers, informing Dr. Jelly-Boyers that he and their other roommates were having problems with Plaintiff. Mr. Jackson alleged these problems to include Plaintiff becoming easily irritated over minor problems, intimidating several female roommates, and had picking fights with Mr. Jackson's wife. Plaintiff was asked to leave the property, but he returned and posted signs on the front

door of the property, including one that stated, "Thieves and liars live here." (Jelly-Boyers Aff. ¶ 7).

Dr. Jelly-Boyers met with Plaintiff to discuss Mr. Jackson's concerns. Plaintiff admitted to the conflict with Mr. Jackson and to posting the sign. According to Dr. Jelly-Boyers, Plaintiff was very angry and defensive during the meeting, and she assessed that he showed a lack of insight or understanding as to why his behavior was inappropriate. Dr. Jelly-Boyers reminded plaintiff that OSU COM evaluated its students on non-cognitive skills. Dr. Jelly-Boyers believed, in her professional opinion, that Plaintiff's reaction to the incident reflected a failure on his part to meet OSU COM's non-cognitive standards. She informed Plaintiff by letter that the OSU COM Student Progress Committee would review the situation. A copy of that letter as well as a record of the meeting was placed in Plaintiffs student file. OSU COM's Student Progress Committee apparently took no action with regard to the incident.

For Plaintiff's third year of medical school, when a clerkship program was required, Plaintiff chose a clerkship program at the Cleveland Clinic, which was offered by OSU COM through an affiliation with the Cleveland Clinic. Even though Plaintiff would be fulfilling his clerkship requirements through the Cleveland Clinic, he would still be following OSU COM's curriculum, completing his clinical rotations at the Cleveland Clinic and Fairview Hospital, both in Cleveland, Ohio. Plaintiff's first rotation in the program was an OB/GYN clerkship, from September through October of 1994. The second was a psychiatry rotation from November through December of 1994.

As part of both these rotations, Plaintiffs cognitive and non-cognitive skills were evaluated pursuant to the OSU COM standards by full-time staff physicians, fellows and residents who had direct contact with him and who had the opportunity to observe or interact with him. These evaluations were made taking into account Plaintiff's level

of training and in keeping with accepted academic norms. Faculty and resident evaluators reviewed Plaintiff only if they believed that they had sufficient direct contact with him evaluate his performance in a fair and even-handed manner, done in good faith and based on professional judgment.

In his OB/GYN clerkship, Plaintiff worked directly with Defendant Dr. Jacob Palomaki. Dr. Palomaki was the Director of Educational Programs in Gynecology and the Clerkship Coordinator for the Department of Obstetrics and Gynecology at the Cleveland Clinic.

In October of 1994, Dr. Palomaki suggested to Plaintiff that he work with other doctors, completing extra patient histories and physicals, because he believed that Plaintiff needed practice in these skills. Plaintiff did not follow this suggestion.

That same month, Dr. William Michener, then Senior Physician for Student Affairs at the Cleveland Clinic, reviewed the mid-term clinical performance evaluations for all students. The evaluations of Plaintiff indicated problems with his comprehension, retention, and application of material as well as difficulties exhibited in his conduct, including how he interacted with patients and staff. Dr. Jeffrey Hutzler, the Cleveland Clinic's Director of Medical Student Education, asked Dr. Michener to meet with Plaintiff to provide him with support and assistance.

In October of 1994 Dr. Michener met with Plaintiff and sought to discuss with him his OB/GYN clerkship. Plaintiff stated that he did not wish to discuss it. When Dr. Palomaki's perceptions of Plaintiff's performance in the OB/GYN rotation were mentioned by Dr. Michener, Plaintiff responded that he thought the evaluation system was inferior, and that it did not reflect his academic abilities. Plaintiff also told Dr. Michener that no one had observed him doing a patient history. Dr. Michener offered to observe him doing a history and physical, but Plaintiff declined the offer.

Shortly alter his meeting with Dr. Michener, Drs. Hutzler, Palomaki, and Michener met with Plaintiff to discuss evaluations of his performance and his refusal of Dr. Michener's offer to observe him taking a patient history. The doctors informed Plaintiff that, based on evaluations of his performance, he was falling short of expectations with respect to retention, comprehension, and application of medical knowledge and skills. These doctors also provided to Plaintiff a summary of his evaluations.[1] Plaintiff stated that he disagreed with the evaluations. He said that the staff was mistreating him, "setting him up," talking about him behind his back, and there was a secret agenda to single him out. The doctors explained to him that the purpose of these evaluations was to aid him in his education and to assist in the development of his clinical skills. Plaintiff again expressed no desire to cooperate toward improvement based on the evaluations. He was then informed that he was required to participate in an observed patient history and physical.

The OB/GYN and Psychiatry Departments at the Cleveland Clinic recommended to OSU COM that Plaintiff receive satisfactory or passing grades for his clerkships. However, because of his poor evaluations and low exam scores, the OB/GYN department recommended that Plaintiff be referred to the Med III/IV Student Review Subcommittee at OSU.

The OSU COM Psychiatric Grading Committee adopted the Cleveland Clinic's recommendation and gave Plaintiff a satisfactory grade. However, the OB/GYN Grading Committee at OSU COM did not accept the recommendation and assigned Plaintiff an unsatisfactory (failing) grade.

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[1] Summaries of evaluations and not the full evaluations were given to students so that individual evaluators could remain anonymous. This was to encourage evaluators to make honest comments about the students.

On December 12, 1994 Plaintiff was informed that he received from OSU COM a failing grade for his OB/GYN rotation. That day Plaintiff encountered Drs. William Kobak and Marie Fidela Paraiso of the OB/GYN Department of the Cleveland Clinic. Dr. Kobak greeted Plaintiff. Plaintiff then turned and spat on Dr. Kobak. This incident was reported to Drs. Hutzler and Palomaki. Plaintiff met with Dr. Hutzler and the Cleveland Clinic's student registrar. He first claimed that he sneezed on Dr. Kobak but later admitted that he spat because he had been harassed and was not supported. Plaintiff accused Dr. Hutzler of wanting him to fail his OB/GYN rotation and of being "out to get him" along with Dr. Palomaki. Dr. Hutzler offered to Plaintiff the services of various individuals at the Cleveland Clinic, but Plaintiff refused Dr. Hutzler's offer. Dr. Hutzler placed Plaintiff on administrative leave.

The OSU COM Student Progress Committee became involved in the matter to ensure that Plaintiff was not a danger to himself, the attending physicians or patients. Plaintiff was required to meet with Dr. Krupp, a psychiatrist, and to be evaluated for OSU COM as part of Plaintiff's non- cognitive requirements in OSU COM's medical training program. Plaintiff refused to see Dr. Krupp until he was informed that he would remain on leave until he agreed to the evaluation. Plaintiff was informed that the results of the evaluation were subject to review by OSU COM and the Cleveland Clinic.

Dr. Krupp issued his report on December 14, 1994. Dr. Krupp concluded as a result of his evaluation of Plaintiff that, while Plaintiff had obsessive-compulsive personality traits, he (Dr. Krupp) did not see "any evidence to persuade [him] that he is in any way a danger to himself or others, including patients, nor any reason why he would be inappropriate as a physician."

On December 19, 1994 the OSU COM Med III/IV Student Review Subcommittee held a hearing to review Plaintiff's performance and fitness for the program. The

members of the Subcommittee who were present unanimously recommended that Plaintiff be dismissed from OSU COM. Plaintiff was informed of this decision by letter in January 1995. The letter, written by Dr. Shy, the chairperson of the Subcommittee, informed Plaintiff of the OSU COM standards he was found to have violated and that this recommendation would be considered by the Clinical Academic Standing Committee.

On February 9, 1995 the Clinical Academic Standing Committee held a hearing on the Subcommittee's recommendation for dismissal. Dr. Mary McIlroy, chairperson of the committee, had previously advised Plaintiff by letter dated January 10, 1995 that he could appear before the committee accompanied by an advocate, could present written or oral information, and that he could have up to two faculty, staff or other health care professionals provide the Committee with information regarding his clinical performance. Plaintiff was accompanied by Dr. Collins who acted as his advocate. The Committee reviewed Plaintiff's progress in medical school, heard his statements to the Committee, asked him questions and heard responses, and reviewed Dr. Collins' written comments. The Committee did not consider Mr. Jackson's (Plaintiff's former roommate's) earlier report to Dr. Jelly-Boyers or matters prior to his admission to medical school.

The Committee voted five to four to defeat a motion that Plaintiff be dismissed from OSU COM and thereafter approved a motion to require Plaintiff to participate in a remediation program. Plaintiff was informed by letter dated February 13, 1995 that, to remain in medical school, he would be required to take a leave of absence from his clinical experiences for three months, and during that time participate in supervised tutorial/clinical experiences with an assigned faculty mentor/tutor. Thereafter, Plaintiff would be required to restart his third year of medical school in June or July, 1995. This curriculum would have to be satisfactorily completed in whole, with certain stated

exceptions. He would receive no credit for third-year work completed to date. He was to be evaluated by a psychiatrist with a goal of assessing and developing Plaintiff's interpersonal skills and insights into behaviors that led to the review process. Plaintiff would be required to follow the recommendations and interventions suggested by the evaluating psychiatrist.

On May 25, 1995 Plaintiff met with members of the Clinical Academic Standing Committee. The purpose of the meeting was to review his progress toward satisfying the requirements established as a result of the February 9, 1995 hearing. Plaintiff stated that he understood those requirements but believed that they were unreasonable, and he refused to comply with them. The Committee explained the rationale behind the requirements, answered Plaintiffs questions, and explained that this type of program had been required of other students, resulting in success. Because Plaintiff refused to make an attempt to meet the requirements set for him for remediation, the Committee voted nine to zero in favor of a motion to dismiss Plaintiff from OSU COM.

The OSU COM Academic Review Board met on June 13, 1995 and approved the recommendation of the Clinical Academic Standing Committee to dismiss Plaintiff from medical school. Plaintiff was afforded the opportunity to attend the meeting and provide information to the Board. The Board's decision was subsequently reviewed and approved by the Dean of OSU COM. On June 14, 1995, Associate Dean Seth Kantor informed Plaintiff that he was dismissed from OSU COM for failure to meet cognitive and non-cognitive standards. He was also advised that he could petition for reinstatement after a passage of a period of time. Plaintiff did not attempt to be reinstated, nor did he apply to any other medical school.

Application of the Law

The claims that are remaining in this action include several claims under 42 U.S.C. § 1983 and state law claims against the Cleveland Clinic.

A. 42 U.S.C. § 1983 Claims

Plaintiff asserts four claims under 42 U.S.C. § 1983. First, he claims that Dr. Jelly-Boyers violated his right to privacy when she put her memorandum and letter regarding the complaint made by Mr. Jackson, Plaintiff's former roommate, in Plaintiff's student file. Second, Plaintiff claims that Drs. Kathy Shy, Brian Bowyer, James Hoekstra, Thomas Mauger, and Roy St. John, acting as members of the Med III/IV Student Review Subcommittee violated his right to freedom of speech when they voted for a motion to dismiss him from OSU COM. Third, Plaintiff claims that Drs. Kantor and Palomaki as well as the Cleveland Clinic violated his right to due process when they gave him summaries of his clinical performance evaluations and refused to provide him with the individual evaluations. Fourth, Plaintiff asserts that Dr. Mary McIlroy, acting as chairperson of the Clinical Academic Standing Committee, violated his right to due process when that committee established the requirements for Plaintiff to continue his medical studies.

To prevail on a 42 U.S.C. § 1983 claim, Plaintiff must prove that the defendant, acting under color of state law, "deprived [of a right 'secured by the constitution and the laws' of the United States". *Flagg Bros., Inc. v. Brooks* (1978), 436 U.S. 149, 155. Plaintiff has not demonstrated the requisite constitutional violation to succeed on these claims.

a. Plaintiff's Claim Against Dr. Jelly-Boyers

There is no general "right to privacy" protected by the U.S. Constitution. The limited privacy rights that have been recognized cover "the most intimate aspects of human affairs." *Eagle v. Morgan* (8th Cir. 1996), 88 F.3d 620, 625. In a situation where a plaintiff is claiming injury due to

"defamatory publications, however seriously they may have harmed [plaintiff's] reputation, they do not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 712 (1976). The "right to privacy," which has been limited to certain "zones of privacy" does not extend to the right to keep disputes with a roommate private. Furthermore, there is not a reasonable basis for expecting privacy in regard to administrative reports and letters placed in a student's file at a public, state-supported university. *Edwards v. City of Goldsboro* (4th Cir. 1999), 178 F.3d 231, 252.

A claim for invasion of privacy has to include the allegation that the private information was disseminated to the public. See *Bloch v. Ribar* (6th Cir. 1998), 156 F.3d 673, 684. The report regarding the dispute Plaintiff had with his former roommate was shared with OSU COM on a limited "need to know" basis because OSU COM has a duty to the public to ensure that students graduating from the program are able to handle the everyday pressures associated with providing healthcare as a doctor. Based on this public trust relationship and the importance of students' non-cognitive skills, OSU COM places all information obtained in student meetings in the medical student's OSU COM student file. Plaintiff's interest in keeping the information private is clearly outweighed by OSU COM's need to distribute the information on a limited "need to know" basis within the University. *Bloch*, 156 F. 3d at 684.

b. <u>Plaintiff's Claims Against Drs. Shy, Bowyer, Hoekstra, Mauger, and St. John</u>

Plaintiff claims that Drs. Shy, Bowyer, Hoekstra, Mauger and St. John violated his constitutional right to free speech when they voted in favor of recommending his dismissal from medical school. Plaintiff alleges that he was punished for his speech before the Med Ill/N Student Review Committee.

In order to prove unconstitutional retaliation for the exercise of free speech, it is necessary for a plaintiff to

show that his speech was constitutionally protected and that the protected speech was a substantial or motivating factor in the allegedly retaliatory decision. *Mount Healthy Board of Education v. Doyle* (1997), 429 U.S. 274, 287; *Langford v. Lane* (6th Cir. 1991), 921 F.2d 677, 683. If a plaintiff is able to satisfy this burden, the defendant is required to prove by a preponderance of the evidence that the same action would have occurred absent the protected speech. *Id.*

The constitutionality of a particular kind of speech is a question of law. *Id.* The First Amendment protects speech that may be depicted as pertaining to a matter of public concern. *Dambrot v. Central Mich. Univ.* (6th Cir. 1995), 55 F.3d 1177, 1185. In order to establish that speech addresses a matter of public concern, "the court must be able to fairly characterize the expression as relating to any matter of political, social or other concern to the community." *Rahn v. Drake Center, Inc.* (6th Cir. 1994), 31 F.3d 407, 412. The question of whether speech addresses a matter of public concern is "determined by the content, form, and context of a given statement, as revealed by the whole record." See *Chappel v. Montgomery County Fire Protection Dist. No. 1* (6th Cir. 1997). If it is found that the speech in question is not a matter of public concern, then the analysis is finished and there is no need to inquire into the motivation for the decision. See *Dambrot*, 55 F.3d at 1186.

Plaintiff's comments before the Med III/IV Student Review Subcommittee are not protected speech, as they were not pertaining to matters of public concern, but rather, his own private interests. The comments made by Plaintiff related to the Cleveland Clinic's alleged actions, and did not go beyond Plaintiff's own personal interests or opinions.

The Subcommittee made the determination that Plaintiff should be dismissed from Medical School based on several factors: Plaintiff's failing grade for his OB/GYN clinical rotation, his conduct at the Cleveland Clinic during and after his clerkship, assessments of his lack of professionalism and poor judgment, his failure to show

respect for his colleagues, his poor insight into his own clinical deficiencies and his general attitude of blaming others instead of being willing to examine his own actions and/or take responsibility for his actions. There is no evidence that the Subcommittee made the determination that Plaintiff should be dismissed from OSU COM in an attempt to punish Plaintiff for the remarks he made about his Cleveland Clinic supervisors. The evidence shows that the Subcommittee heavily weighed the Plaintiff's actions when he spat on an OB/GYN fellow[2]. Even if it could be said that a contributing factor to Plaintiff's dismissal was his "speech" of spitting on a colleague, such "speech" cannot be characterized as protected speech. Plaintiff's claims against Drs. Shy, Bowyer, Hoekstra, Mauger and St. John fail.

c. Plaintiff's Due Process Claims Against Drs. McIlroy, Kantor, Palomaki and the Cleveland Clinic

Plaintiff alleges violations of his due process rights by Drs. McIlroy, Kantor, Palomaki, and the Cleveland Clinic under 42 U.S.C. 1983. Plaintiff contends that he had a constitutionally protected property interest in academic credit and in his continued medical education without being a psychiatric patient and repeating his third year. Specifically, Plaintiff argues that Dr. McIlroy violated his right to due process by failing to inform him of which OSU COM standards he failed to meet in advance of the Clinical Academic Standing Committee meeting held on February 9, 1995; that Dr. McIlroy violated his due process rights when the Clinical Academic Standing Committee considered his "whole prior life," without giving him the opportunity for rebuttal; and that Drs. Kantor and Palomaki and the

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[2] While the act of spitting in and of itself may be characterized as speech, spitting on another person is clearly not protected speech, as it may involve physical injury to another and may constitute a claim for tortious conduct. Moreover, Plaintiff later admitted that this action was related to his private concerns of believing he had been harassed.

Cleveland Clinic violated his due process rights because he was not given access to copies of his clinical performance evaluations prior to the hearing to appeal his failing grade for his OB/GYN rotation.

i. Procedural Due Process

Procedural due process "delineates the constitutional limits on judicial, executive and administrative enforcement of legislative or other governmental dictates or decisions." *Jenkins v. Hutton* (1997), 967 F. Supp. 277, 281 (quoting Laurence Tribe, *American Constitutional Law*, § 10-7 at 664 (2d ed. 1988)). Due process is not a technical concept. It is flexible and must be considered in the context of the surrounding circumstances. *Mathews v. Eldridge* (1976), 424 U.S. 319, 334.

In determining if there has been a procedural due process violation, the Court must consider three factors: (1) "the private interest that will be affected by the official action;" (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Assuming *arguendo* that Plaintiff has a protected liberty or property interest in continuing his education at OSU COM, there has been no deprivation of his due process rights. Plaintiff was informed of the faculty's concerns with his performance and his failure to meet both the cognitive and non-cognitive requirements necessary to continue his education. He was informed of what steps he would have to complete in order to remediate his deficiencies and continue his enrollment at OSU COM. The ultimate decision to dismiss Plaintiff was made in a prudent and methodical fashion.

The U.S. Supreme Court has considered the procedural due process required when a state university,

particularly a medical school, decides to dismiss a student for academic reasons. *Board of Curators of the Univ. of Mo. v. Horowitz* (1977), 435 U.S. 78. In reaching its conclusion, the Court compared the process of dismissing a student for academic reasons and dismissing a student for disciplinary reasons. The Court noted that "evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which [courts] have traditionally attached a full-hearing requirement." *Id.* at 89. Where a dismissal is based upon poor academic performance, that decision rests squarely within the "subjective and evaluative" judgment of the faculty. *Id.* at 90. Such a decision necessarily rests upon the expertise of the faculty in assessing cumulative information about the student's performance. *Id.* at 89. This process is simply not suited to a formal, judicial-like procedure. *Id.* The Court stated that it "decline[d] to... formalize the academic dismissal process by requiring a hearing." *Id.*

A decision to dismiss a student must be "careful and deliberate" but there is no hearing requirement. *Schuler v. Univ. of Minnesota* (1986), 788 F.2d 510, 514. In *Schuler* the U.S. Court of Appeals for the Eighth Circuit considered the dismissal of a doctoral student. The court held that the university went beyond what was constitutionally required by granting the student an "opportunity to appear personally before the department grievance committee, however informal the hearing." *Id.* Likewise, in *Jenkins*, the court held that procedural due process requirements were satisfied because the student was given several opportunities to address the bodies making the recommendations and decisions concerning his dismissal. *Jenkins*, 967 F.Supp at 282.

In the instant case, Plaintiff was afforded several hearings and appeals and was even given opportunities to remain enrolled in the college of medicine by meeting certain additional requirements.

Plaintiff was notified of the December 19, 1994 hearing before the Med III/IV Student Review Subcommittee, and he in fact attended that meeting. He was informed by letter the following month of the Subcommittee's decision. Plaintiff was advised that the Subcommittee found that he had failed to meet certain cognitive and non-cognitive standards required by OSU COM. The letter further informed Plaintiff that the Subcommittee's decision would be reviewed by the Clinical Academic Standing Committee on February 9, 1995.

By separate letter from Dr. McIlroy, dated January 10, 1995, Plaintiff was advised that he could appear before the Clinical Academic Standing Committee, that he could be accompanied by an advocate, that he could present written or oral information to the Committee, and that he could have as many as two faculty, staff, or other health care professionals provide the Committee with information regarding his clinical performance. Plaintiff did appear at the hearing. The Committee reviewed pertinent information at the meeting including Plaintiff's pre-clinical performance and admissions information, as well as any other information Plaintiff wished to present to the Committee. Plaintiff was afforded the opportunity to present rebuttal testimony addressing concerns raised by the Committee members.

The Committee required remediation as a condition of staying in the program at OSU COM. Plaintiff requested that those requirements be reviewed by the Dean of OSU COM, Manuel Tzagournis, M.D. Dean Tzagournis reviewed and concurred with the requirements established for Plaintiff by the Committee.

Plaintiff met again with the Committee on May 25, 1995. He told the Committee that he refused to comply with the remediation requirements, and he was given the opportunity to discuss his reasons for the refusal. After that meeting, Plaintiff was notified by letter from Dr. McIlroy

that the Committee would recommend to the Academic Review Board that he be dismissed.

The Academic Review Board met on June 13, 1995, and that meeting was attended by Plaintiff. The Board reviewed the recommendation of the Clinical Standing Committee, determined that the Committee had access to all pertinent information and that OSU COM's policies and procedures had been observed.

Associate Dean Kantor informed Plaintiff on June 14, 1995 that Dean Tzagournis had reviewed and supported the dismissal recommendation and that he was dismissed from OSU COM with eligibility for future reinstatement.

Clearly Plaintiff was provided with far more process than what is constitutionally required. Plaintiff was afforded multiple hearings, several opportunities to both comply with OSU COM requirements and even to remediate. He was provided with multiple opportunities to have any decision affecting his academic career reviewed. This Court can require no more than that. The Court cannot second guess the academic judgments made by the faculty of OSU COM where Plaintiff has presented no evidence that the decision was arbitrary or capricious, or resulted from ill-will. Plaintiff's due process rights have not been violated.

Plaintiff argues that his dismissal was not purely academic. He contends that it rested, at least in part, on several incidents outside of the realm of his academic performance. These included the incident when he spat on Dr. Kobak and the incident involving his former roommates. As discussed above, OSU COM students are required to meet certain requirements in the area of non-cognitive skills as well as cognitive skills.

The faculty considered these incidents because they reflected upon the non-cognitive skills considered necessary for medical students and doctors to effectively interact with patients. The *Horowitz* Court held that hygiene and timeliness may be important factors in determining if a medical student will be a good doctor. *Horowitz*, 435 U.S.

at n.6. Accordingly, the *Horowitz* Court found an academic dismissal where the university considered such factors. *Id.* Spitting on other doctors and refusing to undertake remediation are clearly factors that may be used to determine whether a medical student will meet the necessary non-cognitive requirements for becoming a doctor. The student handbook put students on notice that non-cognitive skills would be considered in evaluating students.

Assuming *arguendo* that the faculty's consideration of these incidents somehow turned the process into a dismissal for disciplinary reasons, the Court finds that due process requirements were nonetheless met. Even in the instance of disciplinary proceedings, a formal hearing is not required. All that is required in such a circumstance is notice and an informal hearing in which the student is permitted to give his version of events. *Horowitz*, 435 U.S. at 89. Again, Plaintiff was given a hearing and the right to appeal as well as the opportunity to meet additional requirements which would have allowed him to remain enrolled at OSU COM. He was not denied procedural due process.

ii. Substantive Due Process

Substantive due process "protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action." *Jenkins*, 967 F.Supp at 282.

To establish a substantive due process violation, Plaintiff must demonstrate (1) that the university arbitrarily and capriciously denied his fundamental right to pursue his education, or (2) that the university's actions were so egregious as to shock the conscience of the court. *Id.*

Courts are split as to whether a graduate-level student has a constitutionally protected interest in completing his or her education. *Id.* But this question need not be resolved where there is no showing of arbitrary and capricious action. Here, Plaintiff has presented no evidence

that the university failed to enforce its rules in other situations or that the university's actions were arbitrary or capricious. Accordingly, there is no violation of Plaintiff's substantive due process rights. See *Id.* at 282 (holding that it is unnecessary to decide if plaintiff had a fundamental right to continue his education because he "failed to demonstrate that his dismissal was arbitrary and capricious, or motivated by bad faith or ill will...").

In *Horowitz*, the Court also briefly considered the respondent's substantive due process claim. The Court noted that "academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'" *Horowitz* at 91. The Supreme Court revisited this issue in *Regents of the Univ. of Mich. v. Ewing* (1985), 474 U.S. 214. In that case, the Court held that the standard was whether the decision is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 225. In the instant case, Plaintiff has presented no evidence that his dismissal was handled any differently from other students who have been dismissed, nor is there any other evidence that suggests that the decision was in any way arbitrary.

In fact, all of the evidence suggests that Plaintiff's dismissal was handled in compliance with OSU COM's policies and procedures and no differently from any other student's dismissal proceedings. Accordingly, there is no genuine issue of material fact regarding Plaintiff's due process claims, and Defendants are entitled to summary judgment on those claims.

d. Qualified Immunity

The Eleventh Amendment to the United States Constitution bars Plaintiff's claims against Drs. McIlroy, Jelly-Boyers, Kantor, and Palomaki in their official capacities as Chair of the Clinical Academic Standing Committee, Assistant Dean, Associate Dean and OB/GYN Clerkship Coordinator, respectively. See *Hall v. Medical*

College of Ohio at Toledo (6th Cir. 1984), 742 F.2d 299, 307. Because the conduct for which Plaintiff seeks to hold the Cleveland Clinic vicariously liable was carried out by OSU and Cleveland Clinic doctors while in the scope of their duties as medical education administrators, the Cleveland Clinic also has immunity under the Eleventh Amendment and R.C. 2305.25 (A)(1), (2) and (5).

The record demonstrates that Drs. McIlroy, Jelly-Bowers, Kantor and Palomaki were not acting in their individual capacities. In view of the fact that Plaintiff has sued Defendants in their individual capacities, Defendants enjoy qualified immunity from the suit. See *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818. According to the qualified immunity doctrine, government officials are immune from liability for civil rights damages insofar as their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

The first step in any qualified immunity analysis is to determine whether a clearly established statutory or constitutional right has been violated. *Bloch*, 156 F.3d at 678. If, and only if, the allegations as supported by the record demonstrate that a constitutional violation has occurred does the Court need to proceed to determine whether the defendants are entitled to qualified immunity. *Brennan v. Twp. Of Northville* (6th Cir. 1996), 78 F.3d 1152, 1154; *Purisch v. Tennessee Tech Univ.* (6th Cir. 1996), 76 F.3d 1414, 1423. As addressed earlier, no due process, right-to-privacy, or freedom of speech constitutional violation has occurred. The evidence shows that Defendants acted in a reasonable manner in regard to Plaintiffs evaluations, and they did not violate Plaintiffs constitutional rights.

B. Plaintiff's State Law Claims Against the Cleveland Clinic

a. Breach of Confidentiality

The Ohio Supreme Court has recognized an independent tort for the "unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship." *Biddle v. Warren General Hospital*, 86 Ohio St. 3d 395, 1999-Ohio-115 at paragraph two of the syllabus. In the instant case, there was no duty of confidentiality because there was prior authorization to disclose any information learned by Dr. Krupp in the course of his psychiatric evaluation of the plaintiff.

In light of the spitting incident, Dr. Hutzler of the Cleveland Clinic and Dr. Kantor, Dean of OSU COM, decided to require that Plaintiff submit to a psychiatric evaluation. Dr. Hutzler required this evaluation both for Plaintiffs benefit as well as for the protection of the Clinic. Likewise, Dr. Kantor sought to ensure that Plaintiff was "not a danger to himself, attending physicians or, most importantly, patients." (Kantor Aff. ¶ 51).

Plaintiff was advised by Dr. Hutzler that he would not be permitted to continue his clinical rotation until he was evaluated. Dr. Hutzler also made Plaintiff aware that the results of the evaluation would be shared with OSU COM and the Cleveland Clinic. Plaintiff did not seek out treatment from Dr. Krupp. In fact, he refused to be evaluated by Dr. Krupp until he was informed that he would have to remain on permanent leave until he was evaluated.

By submitting to the evaluation, Plaintiff consented to the disclosure of the evaluation and any information learned in the course of that evaluation to those involved in his medical education at OSU COM and the Cleveland Clinic. Because of that prior authorization, there was never a duty of confidentiality on the part of Dr. Krupp or the Cleveland Clinic, and any disclosure made to members of OSU COM faculty or the Cleveland Clinic faculty cannot

be considered wrongful. Accordingly, there is no genuine issue of material fact regarding Plaintiff's breach of confidentiality claim, and Defendants are entitled to summary judgment on that claim.

b. Arbitrary and Capricious Grading

Plaintiff has brought several claims of arbitrary and capricious grading against the Cleveland Clinic. Those claims are based upon the following events: (1) Dr. Palomaki's grading standard and alleged refusal to provide evaluations to Plaintiff; (2) Dr. Palomaki's evaluation of Plaintiff's OB/GYN rotation; (3) Dr. Kennedy's evaluation of Plaintiff's OB/GYN rotation; (4) Dr. Belinson's evaluation of Plaintiff's OB/GYN rotation; (5) Drs. Walters' and Palomaki's oral OB/GYN examination of Plaintiff; (6) Dr. Ivan's evaluation of Plaintiff's psychiatry rotation; (7) Dr. Hutlzer's evaluation of Plaintiff's psychiatry rotation; (8) Dr. Linton's evaluation of Plaintiff's psychiatry rotation; (9) requests that Plaintiff perform additional patient histories and physical examinations; and (10) Dr. Krupp's psychiatric evaluation of Plaintiff.

It is well-established that courts must afford great deference to universities in regard to their assessments of students' academic performance. *Ewing*, 474 U.S. at 225; *Cox v. State Med. Bd. Of Ohio* (1948), 83 Ohio App. 316, 320; *Frabotta v. Meridia Huron Hosp. School of Nursing* (1995), 102 Ohio App. 3d 653, 658; *Pham v. Case Western Reserve Univ.* (April 3, 1997), App. No. 71083, unreported. The role of the courts is not to reevaluate the student's performance, but to assure that the student has been treated fairly. *Id.* Therefore, a court may only disturb an academic decision if that decision is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* Generally, the student carries the burden of demonstrating the existence of arbitrariness, capriciousness, or bad faith in the grading process. *Frabotta*, 102 Ohio App. 3d at 658. Absent such evidence,

summary judgment must be granted in favor of the Defendants.

Plaintiff contends that some of the comments contained in his OB/GYN and psychiatry rotations constituted arbitrary and capricious grading. The evidence does not support such a conclusion. First, it should be noted that the Cleveland Clinic faculty recommended that Plaintiff receive passing grades for both of these rotations. It was OSU COM that ultimately assigned Plaintiff failing grades in these clinical rotations. Furthermore, there is no evidence in that comments or recommendations made by agents of Cleveland Clinic were based on anything other than reasoned, professional judgment regarding Plaintiffs performance.

The testimony of the evaluators demonstrates that evaluations were made in a careful and deliberate fashion, were made within the normal grading process, and were focused on the cognitive and non-cognitive requirements for OSU COM students. The deposition and affidavit testimony of the faculty at the Cleveland Clinic shows that there was no bias toward Plaintiff and that he was treated no differently from other students.

The fact that Dr. Palomaki refused to identify who made various comments referenced in Plaintiff's summary evaluation does not constitute arbitrary and capricious grading. The Cleveland Clinic's policy was to give students summaries of their evaluations and not to ascribe specific comments to particular evaluators. The purpose of this approach is to ensure candid evaluations of the students in the clinical programs. If requested, students could find out who submitted evaluations of her or him, but not who made what comments.

Plaintiff was given all information in his OSU COM file including summaries of his evaluations and all of the information that the OB/BYN Grading Committee had to review the appeal of his grade. There is no evidence that Plaintiff's evaluations were handled in an arbitrary or

capricious manner. The procedure itself is reasonable, and the evidence does not show that Plaintiff was singled out to be treated differently from any other student in similar situations.

Plaintiff claims that he was graded arbitrarily and capriciously when he was asked to perform additional or observed patient histories and physical examinations. Dr. Palomaki testified that he made the request because he believed Plaintiff's skills in these areas were below expectations. Dr. Hutzler also requested that Plaintiff take a patient history under observation because of the concerns expressed about his skills. To this end, Dr. Michener offered to observe Plaintiff taking a patient history and performing a physical examination, as did Dr. Makii of Fairview Hospital. Plaintiff refused all of these requests and offers of assistance.

Drs. Palomaki, Hutzler and Michener all testified that they believed Plaintiff was in need of remediation in this area, because he did not possess the skills expected of a third-year student. There is no evidence that any of these individuals were acting out of prejudice or bias toward Plaintiff. There is no evidence that others in Plaintiff's situation had not been treated in the same manner. Absent such evidence, these requests do not amount to arbitrary or capricious grading.

After the spitting incident, Dr. Hutzler requested that Plaintiff submit to a psychiatric evaluation by Dr. Krupp. Plaintiff claims that this, too, constituted arbitrary and capricious grading. Dr. Hutzler testified that this behavior was "far outside the norm for behavior in a professional setting," and that it raised concern on the part of the Cleveland Clinic and OSU COM. (Hutzler Dep. p. 60). The OSU COM Student Progress Committee wanted to ensure that Plaintiff was not a danger to himself, attending physicians, or patients and therefore required the psychiatric evaluation. There is no evidence that the request was arbitrary or capricious. Plaintiff's behavior was clearly

cause for concern, and both OSU COM and the Cleveland Clinic had an obligation to ensure that they would not be endangering anyone by allowing Plaintiff to continue interacting with staff and patients. The evaluation itself was also not arbitrary or capricious. In fact, Dr. Krupp concluded that it would not be inappropriate for plaintiff to become a physician.

Plaintiff claims that he was graded in an arbitrary and capricious manner because the OB/GYN oral examination given by Dr. Walters and Dr. Palomaki was different for each OSU COM student and did not include an adequate sample size for comparison purposes. The oral examinations included series of questions which were similar, but not exactly the same, for each student. Dr. Walters testified that every effort was made to keep the questions as alike as possible from student to student. But variation occurred because follow-up questions would be asked based on the students' answers and on information contained in the students' logbooks and patient cards. Dr. Walters further testified that Plaintiff's examination was focused on evaluation of his skills and knowledge, not on his personality.

Students' answers were measured against all other students who took the OB/GYN clerkship over the course of the whole year, not just in that rotation. Furthermore, Drs. Walters and Palomaki hold a great deal of teaching experience in the area of OB/GYN and therefore had sufficient context in which to grade students, even when there was not a large group. There is no evidence to suggest that the grading of this examination was done in an arbitrary or capricious manner.

Lastly, Plaintiff alleges that he was graded in an arbitrary and capricious manner as a result of Dr. Kobak's claim that Plaintiff spat on his lab coat. Dr. Krupp did submit a formal report of the incident, but that report was not submitted until after Plaintiff's OB/GYN evaluations were completed. In fact, the incident occurred on the day

that Plaintiff was notified that he had failed his OB/GYN rotation. The report itself cannot be considered arbitrary or capricious grading because OSU COM requires students to meet non-cognitive behavioral standards. This incident would be a factor in determining if Plaintiff was meeting those requirements. Obviously the Cleveland Clinic did not act outside of academic norms by reporting the incident. It was certainly germane to any evaluation of Plaintiff's fitness to become a physician and engage in interpersonal contact with patients, staff, and other doctors.

Plaintiff has presented no evidence that he was graded in an arbitrary or capricious manner, that he was evaluated in a manner differently from other students, that his evaluators acted out of bad faith, or that his evaluators acted outside of academic norms. Accordingly, summary judgment must be granted in favor of Defendants, as to these claims.

c. Tortious Interference with Contract

Plaintiff alleges that that the Cleveland Clinic tortiously interfered with his contract with OSU COM. This claim is based on the following: (1) Dr. Palomaki's evaluation of Plaintiff's OB/GYN rotation; (2) Dr. Paraiso's evaluation of Plaintiff's OB/GYN rotation; (3) Dr. Belinson's evaluation of Plaintiff's OB/GYN rotation; (4) Dr. Ivan's evaluation of Plaintiff's psychiatry rotation; (5) Dr. Hutzler's evaluation of Plaintiff's psychiatry rotation; (7) Dr. Malone's evaluation of Plaintiff's psychiatry rotation; (8) requests that Plaintiff perform additional patient histories and physical examinations; (9) Dr. Kobak's accusation that Plaintiff spat on him; and (10) Dr. Krupp's psychiatric evaluation of Plaintiff.

To prevail on a claim of tortious interference with contract, a Plaintiff must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages.

Fred Siegel Co., L.P.A. v. Arter & Hadden, 85 Ohio St.3d 171, 1999-Ohio-260, at paragraph one of the syllabus.

A student's enrollment at a university, in combination with paying tuition and attending classes, may reasonably be construed as being contractual in nature. *Bleicher v. Univ. of Cincinnati College of Med.* (1992), 78 Ohio App.3d 302, 308.

As noted above, the Cleveland Clinic did not actually grade OSU COM students. Its faculty only made recommendations as to grades. Therefore, it was the OSU COM OB/GYN grading committee, not the Cleveland Clinic or any of its faculty or resident evaluators, that assigned Plaintiff a failing grade for his OB/GYN rotation. In fact, the Cleveland Clinic actually recommended that Plaintiff receive a passing grade for the OB/GYN rotation. In view of the fact that the Cleveland Clinic recommended that Plaintiff pass, Plaintiff cannot establish that the Cleveland Clinic interfered with Plaintiff's alleged contract with OSU COM.

Plaintiff contends that Dr. Palomaki's consideration of his peers' OB/GYN logbooks and the letter that Dr. Hutzler wrote to Dean Kantor on December 12, 1994, advising him of the spitting incident constituted tortious interference with his alleged contract with OSU COM. Dr. Palomaki stated in his affidavit that the information contained in each medical student's logbook was only used as an indicator of what the student was doing during his clerkship at the Cleveland Clinic and indicated that the use of the logbook did not require that it be checked for accuracy. Regardless, the evaluation of Plaintiff's performance was ultimately based on observations of Plaintiff's clinical performance, his cognitive and non-cognitive skills, his ability to do histories and physicals, his ability to interact with patients and their families as well as information in his peers' log books. Those books were merely one piece of information considered. Even without the consideration of Plaintiff's peers' logbooks, the other

factors used to determine Plaintiff's performance indicate problems he failed to address or remediate and there is ample evidence to show that Plaintiffs alleged contract with OSU COM was not interfered with by the Defendants as alleged.

Moreover, as stated previously, OSU COM considers students' abilities to interact with others as part of the non-cognitive skills requirements. Dr. Hutzler informed Dean Kantor of the spitting incident because such behavior is relevant to an assessment of Plaintiff's non-cognitive abilities. Without more, this cannot be considered evidence of an intent to interfere with Plaintiffs contract with OSU COM.

Plaintiff was asked to submit to a psychiatric evaluation as a result of the spitting incident. Dr. Krupp performed the evaluation and reported that it would **not be inappropriate** for Plaintiff to become a physician. Clearly there is no indication that the evaluation constituted tortious interference, since Dr. Krupp essentially recommended that Plaintiff be allowed to continue his medical education.

Plaintiff was asked to do additional patient histories and physical examinations because the Cleveland Clinic faculty believed he needed improvement and practice in that area. There is no evidence that this requirement was the result of any intent, on behalf of the Cleveland Clinic, to interfere with Plaintiff's relationship with OSU COM.

Even if Plaintiff had some evidence that the Cleveland Clinic intentionally sought to interfere with his contract with OSU COM, there is still no evidence that such interference was undertaken wrongfully. A successful claim of tortuous interference requires proof that the interference was wrongful, i.e. unjustified. *Fred Siegel Co., L.P.A.*, 85 Ohio St. 3d at paragraph two of the syllabus. All of the evidence demonstrates that the Cleveland Clinic evaluated Plaintiff in accordance with academic and clinical norms and sought only to assist Plaintiff in attaining the skill and knowledge levels expected of a third- year medical student,

not to maliciously interfere with that education or to gain anything for itself. There is no evidence that any of the comments were made out of anything but good faith and sound academic judgment. See *Thomson v. Univ. of Cincinnati College of Med.* (Oct. 17, 1996), App. No. 96API02-260, unreported.

There is no genuine issue of material fact regarding the tortious interference with contract claims. There is simply no evidence to support these claims. Accordingly summary judgment is appropriate in favor of Defendants on these claims.

d. Conspiracy

Plaintiff alleges that the Cleveland Clinic conspired with Drs. Michener, Palomaki and Hutzler to grade Plaintiff in an arbitrary and capricious manner and in a conspiracy to interfere with Plaintiff's implied contract with OSU COM.

A civil conspiracy is "a malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages." *Id.* It is necessary to first have an unlawful act before a civil conspiracy claim can succeed. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-294, at 475; see also *Davidson v. BP Am., Inc.* (1997), 125 Ohio App.3d 643, 652. The evidence in this case clearly does not support a conspiracy because there is no underlying unlawful act.

e. Fraud

Plaintiff alleges in his complaint that the Cleveland Clinic committed a fraud against him when it failed to inform him, prior to electing to do his third year of medical school at the Cleveland Clinic, that his "personality" would be graded.

The elements of fraud are (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of falsity, or such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of

misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Williams*, 83 Ohio St. 3d at 475.

There is no basis for Plaintiff's claim that OSU COM failed to inform Plaintiff what specific non-cognitive attributes of a medical student's behavior would be assessed during his time at OSU COM. Plaintiff was provided a copy of the Student Handbook which stated that OSU COM required students to meet non-cognitive standards in their pursuit of medical degrees. There was no "failure to disclose" to Plaintiff those non-cognitive factors that would be considered in his evaluations.

The staff at the Cleveland Clinic did not grade his personality; rather it considered both cognitive and non-cognitive factors, consistent with OSU COM requirements which included his clinical skills, his ability to do patient histories, and his ability to interact with patients.

Furthermore, Plaintiff failed to allege in his Complaint all the necessary elements of a fraud claim. Plaintiff failed to claim that Cleveland Clinic had a duty to disclose to Plaintiff his personality would be graded. Plaintiff failed to allege that the Cleveland Clinic's concealment was made falsely or with an intent to mislead him. And he failed to allege that he justifiably relied upon such concealment.

Having viewed the evidence in a light most favorable to Plaintiff, the Court finds that no genuine issue of material fact exists with respect to Plaintiff's claims, and reasonable minds can reach but a single conclusion. Accordingly, Defendants are entitled to judgment as a matter of law.

For these reasons, it is hereby

ORDERED that Defendants', the Cleveland Clinic Foundation, Jacob Palomaki, M.D., Pamela Jelly- Bowers, Ph.D. Kathy Shy, M.D. Seth Kantor, M.D., Brian Bowyer, M.D., James Hoekstra, M.D., Thomas Mauger, M.D., Roy

St. John, M.D. and Mary McIlroy, M.D., Motion for Summary Judgment, filed March 4, 2002, shall be, and is GRANTED. It is further

ORDERED that pursuant to Loc. R. 25.01, counsel for the Defendants shall prepare and circulate an appropriate judgment entry that reflects this decision. The judgment entry shall be titled as follows:

JUDGMENT ENTRY
GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
FILED MARCH 4, 2002

and shall contain the necessary language that, "There is no just cause for delay in the entry of this order." It is further

ORDERED that Defendants' motion for protective order, filed January 11, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion for a protective order, filed January 14, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion to quash, filed January 15, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion for an order prohibiting Plaintiff from testifying, filed January 31, 2002, is DENIED as moot. It is further

ORDERED that Plaintiff's motion for a protective order, filed February 1, 2002, is DENIED as moot. It is further

ORDERED that Plaintiffs motion for judicial notice, filed February 11, 2002, is DENIED as moot. It is further

ORDERED that Plaintiffs motion for a pretrial conference, filed February 19, 2002, is DENIED as moot. It is further

ORDERED that Plaintiffs motion for a protective order, filed February 19, 2002, is DENIED as moot. It is further

ORDERED that Plaintiffs motion to compel, filed April 12, 2002, is DENIED as moot. It is further

ORDERED that nonparty Jane Trask's motion to quash, filed April 23, 2002, is DENIED as moot. It is further

ORDERED that Plaintiffs motion for judicial notice, filed June 26, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion in limine, filed July 1, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion in limine, filed July 12, 2002, is DENIED as moot. It is further

ORDERED that Defendants' motion to quash, filed July 19, 2002, is DENIED as moot. It is further

ORDERED that Plaintiffs motion for written order regarding continuance of July 23, 2002 trial date and for new trial date, filed August 30, 2002, is DENIED as moot.

IT IS SO ORDERED.

s/Jennifer L. Brunner
JENNIFER L. BRUNNER, JUDGE

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